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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS

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OF THE STATE OF TEXAS

DANNA PRESLEY CYR, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Gaines County

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STATE'S REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

DANNA PRESLEY CYR, Appellant

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STATE'S BRIEF ON THE MERITS

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

POINTS IN REPLY

1. **Appellant's guilt has nothing to do with agreement with her husband's conduct or her contemporaneous power to stop it.**

2. **Appellant's conceptualization of Section 6.04(a) ignores its plain language.**

ARGUMENT

Appellant was convicted of reckless injury to a child by omission for failing to protect her daughter, J.D., from her husband, Justin, and for failing to seek medical care after the fact.[1] The first theory makes her responsible for any injury caused by Justin. The second theory in not amenable to concurrent causation on this record.

[1] 1 CR 5.

I. Appellant's guilt has nothing to do with her agreeing with her husband's conduct or her contemporaneous power to stop it.

Appellant repeatedly claims the State is trying to equate its theory of her guilt to party liability.[2] It is not. The State's opening brief to this Court did not draw any equivalence to it, false or otherwise; it did not mention party liability outside of explanations of other cases. But appellant's discussion of this threshold issue reveals related misunderstandings that should be addressed before further discussion.

The State's central premise is that an offense that makes the defendant criminally responsible for the harm caused by exposure to risk is incompatible with a causation instruction that shifts blame to the risk. It does not matter whether that risk is a swimming pool, a wild animal, or another person.

This is not to say the defendant can be the only person criminally responsible. If the risk her recklessness allowed to cause injury is a person, that person can be charged with whatever crime fits. But the possibility of such a prosecution does not change the defendant's culpability.

That is why the law of parties set out in Sections 7.01 and 7.02 is inapplicable. The State did not charge appellant with an intentional or knowing offense under the

[2] App. Br. at 15 ("The State attempts to draw an equivalence between reckless injury to a child by omission and parties liability."), 31 ("The State fashions a false equivalence between the law of parties and reckless injury to a child by omission.").

theory that it could apply the law of parties to Justin's conduct.[3] No one said she wanted something bad to happen to J.D. Relevant here, it accused her of recklessly failing to protect J.D. from Justin. It does not matter what offense and mental state Justin could be charged with. Appellant's "defense" that Justin caused the injury was thus not enough to nullify appellant's guilt. All it did was focus the jury's attention on whether appellant consciously disregarded the risk Justin posed and whether doing so was a gross deviation from the ordinary standard of care.[4]

Appellant's focus on Justin's conduct at the time J.D. was shaken shows a second misunderstanding about the State's theory of liability. Recklessness is the disregard of perceived risk. It is prospective. Appellant was thus charged, in relevant part, with disregarding the risk Justin posed to J.D. generally. The State argued she should not have let him in the same house as J.D. She was not—in law or fact—charged directly for his act. It therefore does not matter whether she was "relatively powerless [to stop Justin at the time] in light of all the exigent circumstances."[5] That is a rhetorical argument that begs the question: what does it

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[3] *See*, *e.g.*, TEX. PENAL CODE § 7.02(a)(1) ("A person is criminally responsible for an offense committed by the conduct of another if . . . acting with the kind of culpability required for the offense, he . . . .").

[4] TEX. PENAL CODE § 6.03(c) (defining recklessness). As explained in the State's opening brief, the court of appeals has yet to decide whether such a finding would have been rational.

[5] App. Br. at 17. This line of thinking evokes the inapplicable "battered wife" affirmative defense contained in TEX. PENAL CODE § 22.04(l)(2). That provision's existence further suggests the argument appellant makes is irrelevant outside its specific circumstances.

mean to recklessly cause serious bodily injury by omission when the risk you consciously disregarded is another person? The answer: the same thing it means when the risk is not another person. Concurrent causation is incompatible with this theory of criminal responsibility.

II. Appellant's conceptualization of Section 6.04(a) ignores its plain language.

As argued in the State's opening brief, if concurrent causation is applicable in principle, it was not raised by this record. Appellant says there is "ample evidence" that her failure to seek medical care "was clearly insufficient to cause serious bodily injury to J.D. and determine that Mr. Cyr was essentially the overwhelming and primary cause of J.D.'s injuries."[6] Her assessment makes sense only if the purpose of the instruction is to apportion responsibility. It isn't. It is to give the jury the opportunity to decide whether a defendant is not guilty because her conduct—"but for" though it may be—was clearly insufficient to cause the result on its own.

Section 6.04(a) says:

> A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.[7]

Appellant says the "unless" clause "focuses on the relative significance of the defendant's conduct as compared to the other causes of a result and limits criminal

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[6] App. Br. at 30.

[7] TEX. PENAL CODE § 6.04(a).

culpability when the defendant's contribution is comparably weak or insignificant."[8] Regardless of whether that was the impetus for Section 6.04(a), that is not what the Legislature wrote. The operative clause of Section 6.04(a) could easily have said, "unless the concurrent cause was the primary cause of the result," or "unless the conduct of the actor was insignificant compared to the concurrent cause." Then the jury might be free to decide relative responsibility for the injury, as though it were a tort lawsuit.[9] But this is not civil law, and Section 6.04(a) is not an exercise in responsibility apportionment.

Instead, Section 6.04(a) is framed in terms of the clear sufficiency or insufficiency of each concurrent cause on its own. In most cases, the applicability of Section 6.04(a) comes down to one question: was what the defendant did clearly insufficient to produce the result? If it was not clearly insufficient, it does not matter how primarily or even overwhelmingly a concurrent cause contributed to the result. The upshot is that actors who commit an act or omission that could have caused the result are guilty even though another cause also could have—or most likely did. In

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[8] App. Br. at 13.

[9] *See*, *e.g.*, TEX. CIV. PRAC. & REM. CODE §§ 33.003(a) ("The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers, for the following persons with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these: (1) each claimant; (2) each defendant; (3) each settling person; and (4) each responsible third party who has been designated under Section 33.004."), 33.013 (describing rules for liability in excess of percentage of responsibility).

short, bad actors do not go free because of worse actors. This formulation reflects the policy choice the Legislature made. It should be respected.[10]

This case is an opportunity to show that respect. If entitlement requires affirmative evidence that appellant's failure to seek medical care was clearly insufficient to cause J.D.'s serious bodily injury, there was none. Appellant recounts most of the evidence and calls it "ample" but does not explain why that is so. No witness—doctor or otherwise—said anything like that. All the evidence that Justin's conduct caused some serious bodily injury is irrelevant to whether appellant's failure was clearly insufficient to cause any serious bodily injury. This is because both can be true: shaking can cause serious bodily injury, and an unconscionable delay in seeking medical care after head trauma is not clearly insufficient to cause serious bodily injury. Appellant's criminal conduct is not excused because Justin's was worse.

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[10] *Vandyke v. State*, 538 S.W.3d 561, 569 (Tex. Crim. App. 2017) ("We are not empowered to substitute what we believe is right or fair for what the Legislature has written, even if the statute seems unwise or unfair. . . . If we only defer to the legislature when we agree with their policy determinations then we are not deferring to the legislature at all.").

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals reverse the judgment of the Court of Appeals.

Respectfully submitted,

/s/ John R. Messinger

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CERTIFICATE OF COMPLIANCE

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The undersigned hereby certifies that on this 13th day of January, 2022, the State's Reply Brief has been eFiled and electronically served on the following:

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